FOR ARGUMENT

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No. 95-388

IN THE

Supreme Court Of The United States

October Term, 1995

ANTONY BROWN, et al.,

Petitioners,

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. Pursuant to Rule 37.3, The National Electrical Contractors Association, Inc. has obtained and has filed herewith the written consent of the petitioners and the respondents to the submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

Petitioners seek to have the Court rule that the nonstatutory labor exemption to the antitrust laws is no longer applicable either (a) when the collective bargaining agreement expires, or (b) when the parties reach impasse in their

negotiations for a new agreement. The United States and the Federal Trade Commission as *amici curiae* urge the Court to hold that the non-statutory exemption ceases to apply upon impasse. If either the position of the petitioners or the modified position of the United States and the Federal Trade Commission (hereinafter "the Government") is adopted, multiemployer bargaining will cease to exist in its current state. It may cease to exist entirely.

Petitioners and their supporting *amici* suggest that many options will remain available to multiemployer groups even if they are subjected to antitrust scrutiny at either the time that the collective bargaining agreement expires or at impasse. In truth, subjecting the ***collective bargaining conduct*** of multiemployer groups to antitrust scrutiny will most certainly create too much risk and uncertainty for the vast majority of employers to participate in collective bargaining on a multiemployer basis. The reason for this is simple: If employers can lawfully implement unilaterally terms and conditions of employment under the National Labor Relations Act (hereinafter "NLRA") yet be faced with antitrust claims if they do the same thing on a group basis, they will opt to bargain separately.

The National Electrical Contractors Association, Inc. (hereinafter "NECA") has a vital stake in the continued health of multiemployer bargaining. Moreover, because of its status as the largest organization of unionized electrical contractors in the United States, NECA is in a unique position to contribute to the Court's understanding of the practical harm that would occur if this petition is granted and the antitrust laws are applied to traditional collective bargaining.

NECA is a construction trade association composed of approximately 4000 electrical contractors served through 119 chapters in the United States chartered by and affiliated with the National Association. The primary purpose of these

chapters is to act as multiemployer bargaining agents for the negotiation and administration of collective bargaining agreements on behalf of electrical contractors who authorize the local chapters to act as their collective bargaining agent with the appropriate local union of the International Brotherhood of Electrical Workers, AFL-CIO. The number of contractors, including both members and nonmembers of NECA, that authorize NECA chapters to bargain on their behalf is approximately 15,000. Chapters frequently negotiate more than one collective bargaining agreement with a local union or local unions of the IBEW, depending upon the type of work being performed. In all, collective bargaining agreements between NECA chapters and IBEW local unions cover more than 160,000 employees.

Multiemployer bargaining in the electrical construction industry has been a resounding success. The industry is largely strike-free. Productivity within the trade is excellent and increasing. Journeymen electricians are among the highest paid craftsmen. Much of this stability can be traced to the fact that labor and management bargain and engage in contract administration during the term of the labor agreement on a multiemployer basis. If this petition is granted, the landscape of collective bargaining in this industry, which relies nearly exclusively upon multiemployer bargaining, will be drastically affected.

It is NECA's intention in this brief to address the petitioners' contention that their position is consistent with federal labor policy and does not threaten multiemployer bargaining. This analysis from the perspective of the unionized side of the electrical construction industry is not represented by any of the parties and, therefore, would prove useful to the Court.

SUMMARY OF ARGUMENT

1. There is no place for application of the antitrust laws to conduct contained within the collective bargaining process. The nonstatutory labor exemption must apply to all aspects of the collective bargaining process as long as the parties do not seek to impose restraints upon third parties.

Consistent with that principle, neither this Court nor the Courts of Appeal have sought to impose the antitrust laws on either labor or management for conduct confined to the collective bargaining relationship. Only when one or both of the parties to the collective bargaining relationship seek directly to impose terms and conditions of employment upon third parties or to control the product market under the guise of collective bargaining have the federal courts stepped in to apply the antitrust laws.

2. Multiemployer bargaining operates in virtually all industries in the United States. In the construction industry, where employees may work for one employer one week and another employer another week, and where most employers are not large businesses, multiemployer bargaining is dominant. Both the Congress and the Court have indicated that multiemployer bargaining is not just a lawful means by which to engage in collective bargaining, but a process of bargaining that is worthy of protection to further the national labor policy of promoting peaceful and positive labor relations.

If traditional collective bargaining is going to thrive, it can only do so without the imposition of the antitrust laws as another layer of regulation atop the existing framework established under the National Labor Relations Act. Allowing recourse to the antitrust laws to enable one party to a multiemployer collective bargaining relationship to affect directly terms and conditions of employment that are the

subject of that relationship will destroy the legal framework carefully constructed under the National Labor Relations Act to promote good faith collective bargaining.

3. The threat of antitrust exposure to the average small business contractor for participating in multiemployer bargaining will cause many employers to abandon it. Even those who stay may ultimately leave because of the ever-growing weakness of the multiemployer group caused by the first wave of contractors opting out of multiemployer bargaining. Petitioners and the Government are plainly wrong that the antitrust exposure of post-contract termination conduct in a multiemployer setting will still leave the employers and the multiemployer bargaining agent with sufficient options to preserve multiemployer bargaining. With all due respect to the proponents of that argument, it demonstrates a clear lack of understanding or appreciation for the nature of collective bargaining, the alternative available to employers, especially outside of professional sports, to bargain individually, and the simple fact that employers by the droves will opt out of multiemployer bargaining if the mere participation in it exposes them to antitrust liability.

ARGUMENT

I.

THIS COURT HAS NEVER EXPOSED PARTICIPANTS IN COLLECTIVE BARGAINING TO ANTITRUST LIABILITY FOR COLLECTIVE BARGAINING CONDUCT DIRECTED AT THE OTHER PARTY TO THE COLLECTIVE BARGAINING RELATIONSHIP WHERE THERE IS NO CONTENTION THAT THE CONDUCT HAS AN ANTICOMPETITIVE EFFECT ON THIRD PARTIES

Petitioners have characterized the decision below as "a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws." Petitioners' Brief (hereinafter "Pt. Br.") at 14. At the same time, the Government declares that "the Court of Appeals extended the exemption far beyond its proper scope." Brief of the United States and the Federal Trade Commission (hereinafter "U.S. Br.") at 6. To the contrary, as the Court below recognized, in the more than fifty years since the Court first enunciated standards for applying the antitrust laws in the labor relations context,[1] ***no*** court has ***ever*** ruled that employer collective bargaining conduct that is both contemplated and endorsed by federal labor law may constitute an antitrust violation, unless it is aimed at restricting the ability of a third party to compete. *See Brown v. Pro Football, Inc.,* 50 F.3d 1041, *cert. granted,* 116 S.Ct. 593 (1995).

Petitioners argue that the *sine qua non* for application of the nonstatutory labor exemption is the union's consent to the terms and conditions of employment implemented or

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[1] *See Apex Hosiery v. Leader*, 310 U.S. 469 (1940), and *United States v. Hutcheson*, 312 U.S. 219 (1941).

maintained by the multiemployer group. In arguing that the nonstatutory labor exemption is coextensive with the union's consent, petitioners place undue reliance on language in prior cases of this Court linking the nonstatutory exemption to the existence of a union employer agreement. As the Court of Appeals below correctly noted, this Court has never addressed the application of antitrust laws to employer conduct (as distinct from agreement) in collective bargaining. Since the Court has considered only union employer agreements in nonstatutory exemption cases, it is "hardly surprising" that the Court's holdings have been couched in terms of union employer agreements. *Brown*, 50 F.3d at 1050.

Specific union consent, as opposed to the noncompetitive effect of union organizing, has never been the rationale for the nonstatutory labor exemption. The Court's formulation of the nonstatutory exemption in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), did not turn on the existence of an agreement, but on the recognition that the goals of federal labor law cannot be reached unless the anticompetitive effect of unionization is exempt from the antitrust laws:

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. ***The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.*** See *Mine Workers v. Pennington*, *supra*, 381 U.S. at 666, 85 S.Ct. at 1591; *Jewel Tea*, *supra*, 381 U.S. at 692-693, 85 S.Ct. at 1603-1604 (opinion of White, J.) (emphasis supplied).

Connell, 421 U.S. at 622-623. **"The governing factor"** in determining the application of antitrust law, this Court stated, **"is the risk of conflict with the NLRA or with federal labor policy."** *Connell*, 421 U.S. at 637 (emphasis supplied).

In addition to the Court of Appeals below and the Second and Eighth Circuits, which have expressly rejected petitioners' theories,[2] the Ninth Circuit, in a decision by Justice Kennedy, has interpreted *Connell* to mean that the nonstatutory exemption applies to the full panoply of collective bargaining and not just to the collective bargaining agreement:

> In *Connell*, before finding that the nonstatutory exemption did not apply, the Court made extensive analysis of the anticompetitive effect of the challenged contract, which was not a collective bargaining agreement. Such analysis would have been unnecessary if the nonstatutory exemption were limited to restraints imposed by collective bargaining agreements.

Richards v. Neilsen Freight Lines, 810 F.2d 898, 905 (1987).

Moreover, petitioners' reliance on the absence of union consent to support its position here ignores the fact that multiemployer bargaining ***itself*** is consensual. *E.g. Retail Associates*, 120 N.L.R.B. 388 (1958); *The Evening News Ass'n*, 154 N.L.R.B. 1494 (1965). The union representing employees must have been notified of the formation of the multiemployer group and have ***assented*** to bargaining on a multiemployer basis. *Charles D. Bonanno Linen Service*, 454 U.S. 404, 420-421 (1982) (concurring opinion of Justice

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[2] *NBA v. Williams*, 45 F.3d 684 (1995), *petition for cert. pending*, No. 95-137; *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Stevens).[3] The union's consent to participate in the multiemployer bargaining process should be enough to invoke the protection of the nonstatutory labor exemption.

II.
FEDERAL LABOR LAW REGARDING THE OPERATION OF MULTIEMPLOYER BARGAINING WOULD BE SEVERELY UNDERMINED BY APPLICATION OF THE ANTITRUST LAWS TO POST-CONTRACT OR POST-IMPASSE CONDUCT IN EVERYDAY COLLECTIVE BARGAINING BETWEEN THE TWO PARTIES TO THE COLLECTIVE BARGAINING RELATIONSHIP

A. Application of the Antitrust Laws to Collective Bargaining Conduct Would Strike at the Heart of Federal Labor Law and Destroy the Balance of Rights and Privileges Created By the NLRB to Effectuate Federal Labor Policy

"It is implicit in the entire structure of the [National Labor Relations] Act that the [National Labor Relations] Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970). The framework of rules the Board has developed to reinforce the bargaining process would be severely undermined if a union or employees could readily

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[3] In *North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir. 1980), *reh'g denied*, 616 F.2d 568 (1980), the Court of Appeals upheld the National Labor Relations Board's determination that member clubs of the North American Soccer League were "joint employers" and that a single leaguewide bargaining unit was appropriate. The union petitioned for an election in the leaguewide unit. The case turned on the Board's finding that the soccer clubs were, in essence, one employer and does not stand for the proposition that multiemployer bargaining may be imposed on separate employers, or on unions under any circumstances.

invoke the operation of the antitrust laws after the contract expires or, alternatively, when impasse is reached.

Federal labor law and policy permits each party to employ a variety of economic tools to achieve its bargaining objectives. Unions can strike and/or picket. Employers can lock out. If and when impasse is reached, the NLRA permits the employer to implement unilaterally terms and conditions of employment consistent with its final pre-impasse proposal. *See Brown*, 50 F.3d at 1051-1054; *Powell v. NFL*, 930 F.2d 1302-1303; *NBA v. Williams*, 45 F.3d at 690-691 and cases cited therein. The Board has recognized unilateral implementation of contract proposals after impasse as a legitimate form of economic pressure that can often break the impasse and revive collective bargaining. *See Hi-Way Billboards*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied*, 500 F.2d 181 (1974). *See also Bonanno Linen*, 454 U.S. at 727 n.9 (employer ability to implement unilateral changes counterbalances inability to withdraw from multiemployer bargaining upon impasse).

In addition, the impasse doctrine reflects ststutory policy. Section 8(d) of the NLRA [29 U.S.C. §158(d)] provides that the obligation to bargain requires the parties to meet and confer in good faith concerning terms and conditions of employment but "does not compel either party to agree to a proposal or require the making of a concession." The Board has given effect to this proviso by permitting employers to make unilateral changes if and when they have fulfilled their obligation to bargain in good faith but failed to reach agreement. In *Colorado-Ute Electric Ass'n*, 295 NLRB 607, 609 (1989), the Board stated:

> That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a

duty to agree to the union's counterproposals or to make a concession. See Section 8(d) of the Act. The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent.

In support of their argument that antitrust liability for post-impasse conduct does not undermine federal labor policy, petitioners characterize impasse as the end of federally regulated collective bargaining. The foundation of petitioners' argument is *dicta* in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), suggesting that the right of an employer to impose its final offer at impasse is a product of state common law. Based on this *dicta*, petitioners reason that prohibiting multiemployer groups from implementing their final offers after impasse does not create any conflict with federal labor law. Mere *dicta* cannot support such a radical departure from existing labor law jurisprudence. Petitioners' theory would mean that a state could freely prohibit the unilateral implementation of final offers by any employer after impasse, not just employers involved in multiemployer bargaining. It is doubtful that any court would consider this a permissible infringement on collective bargaining.[4]

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[4] Petitioners also argue that the Sherman Act is the type of "backdrop" statute of general applicability which has been held by this Court not to conflict with the NLRA, relying on *Fort Halifax* and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985). *Fort Halifax* held that a state law requiring payment of severance benefits was not preempted by federal labor law. *Metropolitan Life* held that federal labor law did not preempt a statute requiring insurance policies to include mandatory minimum benefits. The Sherman Act cannot legitimately be analogized to a minimum employment standard. Unlike a minimum standard, application of the Sherman Act as proposed by petitioners would do much more than establish some limitations on the

Moreover, petitioners' assertion that federal labor law is not concerned with post-impasse conduct is simply wrong. Impasse and post-impasse unilateral changes are part of the collective bargaining process governed by the NLRA, not the end of it. As the Board stated in *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23:

> [A] genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover, the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations .... Therefore, it is clear that an impasse is but one thread in a complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.

The employer's ability to make unilateral changes during an impasse in bargaining is delimited by the statutory obligation to bargain. An employer may not make unilateral changes more favorable than the terms of its pre-impasse proposal because this "is necessarily inconsistent with a sincere desire to reach agreement with the union." *NLRB v. Katz*, 369 U.S. 736, 745 (1962). An employer may not make unilateral changes less favorable than the terms of its pre-impasse proposal because this derogates the union's status as collective bargaining representative. *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1340 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 474 (1975).

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universe of substantive terms available for bargaining. It would directly affect the collective bargaining process.

Antitrust exposure for making post-impasse changes will upset the checks and balances the Board has devised over the years to foster vigorous collective bargaining. The prospect of impasse encourages unions to bargain in good faith. If post-impasse unilateral changes are outlawed, unions engaged in multiemployer bargaining will be able, at the very least, to freeze the status quo in terms and conditions of employment merely by inaction. Unions will have little incentive to engage in true give and take at the bargaining table because there will be no risk that the union may lose ground if it fails to negotiate an agreement.

Petitioners also argue that imposing antitrust liability on post-impasse concerted action of a multiemployer group will actually further federal labor policy because it will eliminate an incentive for employers to bargain in bad faith with the goal of forcing an impasse. Pt. Br. at 41-42. It hardly furthers federal labor policy to supplant federal labor law aimed specifically at promoting collective bargaining with the Sherman Act. The NLRA already contains remedies for "surface bargaining," (*i.e.* going through the motions of bargaining with no intent to reach agreement),[5] and for prematurely declaring impasse and unilaterally implementing changes when no lawful impasse has been reached.[6] These remedies are designed to enforce collective bargaining without destroying the collective bargaining relationship. Injecting the considerable penalties available under the antitrust laws into the collective bargaining relationship would frustrate this statutory scheme.

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[5] *Fairhaven Properties, Inc.*, 314 N.L.R.B. 763, 769-772 (1994); *Unbelievable, Inc.*, 318 N.L.R.B. No. 60 (August 30, 1995).

[6] *AMF Bowling Co.*, 314 N.L.R.B. 969, 969 (1994), *enforcement denied*, 63 F.3d 1293 (1995); *Control Services*, 315 N.L.R.B. 431 (1994).

B. Federal Labor Policy to Promote Multiemployer Bargaining Would Certainly Be Undermined if Either the Petitioners' or the Government's Theory Is Adopted

This Court has recognized that "in many industries," including construction, multiemployer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers*, 353 U.S. 87, 95 (1957) (*Buffalo Linen*). In *Buffalo Linen*, this Court upheld a Board decision permitting the seven remaining members of a multiemployer group to lock out employees in response to a strike against the eighth member because the goal of the concerted lockout was to protect bargaining on a multiemployer basis. *Buffalo Linen*, 353 U.S. at 93, 96. In *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), this Court approved the Board's conclusion that neither impasse nor the ability of employers in a multiemployer group to execute individual interim agreements permits an employer to withdraw from multiemployer bargaining unilaterally. The Court noted that the Board had developed this rule "in the interest of the proper and pre-eminent goal [of] maintaining the stability of the multiemployer unit." *Bonanno Linen*, 454 U.S. at 419.

Petitioners' argument is that, once having consented to multiemployer bargaining, the union can resort to the antitrust laws to compel agreement on its terms if the collective bargaining framework established under the NLRA does not yield the results it wants. This ability to pick and choose between the NLRA and the Sherman Act completely undermines the statutory mandate of the Board to promote multiemployer bargaining. The Board has recently reaffirmed the rule that impasse is insufficient to permit withdrawal from multiemployer bargaining because it would destabilize

multiemployer bargaining in much the same way as the application of antitrust laws urged by petitioners in this case. The Board stated:

> Allowing any of the negotiating parties to withdraw from the unit after an impasse the length of the one at issue here would be to put the multiemployer bargaining process in jeopardy whenever bargaining reached an impasse phase and one of the participants was unsatisfied with its prospects for getting all that it wished in a multiemployer contract.

El Cerrito Mill & Lumber Co., 316 N.L.R.B. 1005 (1995). Similarly, the briefs of petitioners and their *amici* are punctuated by examples in professional sports of the complete disintegration of multiemployer bargaining into antitrust litigation when bargaining "got tough," *i.e.*, upon the first impasse in negotiations. The availability of an antitrust cause of action resulted, not in the temporary suspension of bargaining, but in the complete breakdown of the collective bargaining relationship.[7]

The Government contends that suspending the nonstatutory exemption at impasse can be reconciled with federal labor policy because the employer members of multiemployer bargaining groups are permitted under the NLRA to enter into

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[7] These examples resulted from cases holding that employees could escape the nonstatutory labor exemption if they decertified the union. *See* Pt. Br. At 42-44. Petitioners argue that their theory would promote labor policy by eliminating decertification as a prerequisite to antitrust litigation. NECA submits that a rule allowing an antitrust action based on conduct initiated during the collective bargaining relationship if the employees decertify the union is not the way to reconcile federal labor policy with the antitrust laws. Nor is eliminating decertification as a prerequisite to antitrust litigation. Stability in collective bargaining is best assured by applying the nonstatutory exemption to the entire collective bargaining process envisioned by federal labor law.

individual interim agreements with the union once impasse is reached. By entering into interim agreements, the Government contends, the employers can both satisfy federal labor law and avoid antitrust liability arising either from maintenance of the status quo post-impasse or the joint unilateral implementation of pre-impasse contract proposals. The obvious flaw in the Government's analysis is that the it offers the employers no option other than reaching agreement with the union. This is patently contrary to the policies of the NLRA, which are to promote collective bargaining, not to compel agreement. *See* Section 8(d) [29 U.S.C. § 158(d)] (NLRA does not require either party to agree); *H.K. Porter Co.*, 397 U.S. at 106-07 (NLRA grounded on the premise of freedom of contract). Neither the policies of the NLRA nor the Sherman Act would be furthered by allowing one party's control over the other party's antitrust immunity to be used as an economic weapon in collective bargaining.

C. The Threat of Antitrust Liability for Collective Bargaining Conduct Will Drive Electrical Contractors Away from Multiemployer Bargaining

The position shared by petitioners and the Government would leave multiemployer units and their constituent members with the Hobson's choice of risking treble damages in an antitrust suit or foregoing the ability to make any changes in the status quo while the collective bargaining relationship exists. Unlike employers bargaining separately, employers affiliated with a multiemployer group would lose an important means of putting economic pressure on the union to reach a compromise and the flexibility to make necessary business changes if and while bargaining has stalled.

The vast majority of employers in the electrical contracting industry now participating in multiemployer bargaining will not risk such a choice. Multiemployer bargaining in the electrical contracting industry is strictly

voluntary. While professional sports leagues may be forced to adapt to the constraints of antitrust exposure because participation in multiemployer bargaining is enforced by the league, NECA contractors are subject to no such requirement. Faced with even the possibility that their concerted collective bargaining conduct could be scrutinized under the antitrust laws as well as the labor laws and that the rules of the game have been changed so as to limit what they can do as a group, they will opt to withdraw from multiemployer units. Prudent contractors who can be put out of business merely by having to defend a frivolous antitrust suit will opt to bargain with the union independently or, having lost the benefits of group bargaining, may seek nonunion status.[8]

Any advantages of group bargaining will certainly cease to exist. The fact that bargaining on a group basis limits your choices will alone be sufficient to erode multiemployer bargaining. Furthermore, the whole thrust of multiemployer bargaining is to act as a united front. Even if the multiemployer group survives in some fashion, the incentive will be created for employers to avoid bargaining on a group basis once the contract expires or the spectre of impasse has been raised. At the point of either contract expiration or impasse, employers acting out of fear of the antitrust laws will be begging to be the first contractor to sign an interim agreement. Once a number of interim agreements are signed, multiem-

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[8] Petitioners' contention that the employers are only subject to "unreasonable" restraints under the antitrust law fails to appreciate that the threat of antitrust exposure is more than enough to undermine multiemployer bargaining. Pt. Br. at 40. Additionally, the contention that most industries can obtain an agreement from their unions not to sue would serve to reduce the employer groups to subservient status at the feet of their union counterparts every time negotiations commence. Employers could easily find themselves bargaining wages in return for some form of antitrust immunity.

ployer bargaining has collapsed and the "interim agreements" have become final agreements.

These alternative scenarios all point to two conclusions. First, the introduction of the antitrust weapon as a basis to weigh the *bona fides* of the employer's position drastically alters the dynamics of the negotiation process to the disadvantage of the employers, thereby undermining the fundamental principles of the duty to bargain under the NLRA. Second, contrary to the principles enunciated by this Court in *Bonanno Linen* and *Buffalo Linen*, multiemployer bargaining will cease to be a favored method of negotiations simply because the risks associated with it will outweigh its advantages.

CONCLUSION

For the foregoing reasons, NECA respectfully submits that the Court below, consistent with the decision of the Second Circuit in *Williams* and the Eight Circuit in *Powell,* properly rejected the contention that traditional multiemployer collective bargaining is or should be subject to the antitrust laws. Adoption of this unsupported theory would drastically alter the balance that has been crafted under the federal labor laws and would seriously harm if not destroy traditional multiemployer bargaining.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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